STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CARLOYN M. LUCAS, deceased.

KIMBERLY SUMMERS,

Petitioner-Appellant,

v

VIRGINIA LEBOLD, Personal Representative of the Estate of CAROLYN M. LUCAS, deceased,

Respondent-Appellee.

UNPUBLISHED
May 2, 1997

No. 179703
Wayne Probate Court
LC No. 91-868807

Before: Jansen, P.J., and Reilly and W.C. Buhl,* JJ.

PER CURIAM.

Petitioner appeals as of right from the Wayne County Probate Court's order affirming a jury verdict that certain bearer bonds, alleged by petitioner to be part of the decedent's estate, had been given by the decedent to respondent before the decedent's death. We affirm.

Petitioner first argues that the probate court erred in not specifically instructing the jury that respondent, asked by the decedent to act as personal representative of the decedent's estate and therefore in a fiduciary relationship with the decedent, had the burden of proving that the decedent intended to make a gift of the bonds to respondent by clear and convincing evidence. We disagree. Although Michigan case law clearly states that a fiduciary donee must prove that the gift was valid and was not acquired through the exercise of undue influence, no Michigan case mandates that the donee establish this by clear and convincing evidence. See *Kar v Hogan,* 399 Mich 529; 251 NW2d 77 (1976), *LaForest v Black,* 373 Mich 86, 92; 128 NW2d 535 (1964), *Totorean v Samuels,* 52 Mich App 14, 17; 216 NW2d 429 (1974). Where there is no suggestion of fraud or undue influence, very slight evidence is sufficient to establish a gift inter vivos, even between relatives. *Alampi v Frye,* 306

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* Circuit judge, sitting on the Court of Appeals by assignment.

Mich 633, 638; 11 NW2d 270 (1943) (Boyles, C.J., dissenting); *Cook v Fraser,* 298 Mich 374, 378; 299 NW2d 113 (1941). Our sister states likewise have not uniformly required a fiduciary donee to prove the validity of his or her gift by clear and convincing evidence. See *Lemp v Hauptmann,* 170 Ill App 753, 757; 525 NE2d 203 (1988), *In Re Estate of John Jarmuth,* 329 Ill App 619, 631; 70 NE2d 336 (1946), and *Baer v Baer,* 109 Colo 545, 548-549; 128 P2d 478 (1942).

We conclude that the probate court was not obligated to instruct the jury that respondent had to prove the gift by clear and convincing evidence because the supplemental instruction did not inform the jury of the applicable law. *Mills v White Castle Systems, Inc,* 199 Mich App 588, 592; 502 NW2d 331 (1993). The instructions given by the probate court, which informed the jury of the elements and definition of an inter vivos gift and of respondent's burden to establish the gift by a preponderance of the evidence, adequately covered the law regarding the burden of proving the decedent's intent to make a gift. *Bordeaux v Celotex Corp,* 203 Mich App 158, 169; 511 NW2d 899 (1993).

Next, petitioner challenges three evidentiary rulings made by the probate court. Petitioner first argues that the probate court erred by refusing to allow petitioner's ex-husband to testify regarding the decedent's financial recordkeeping habits, pursuant to MRE 406. We disagree. Petitioner's ex-husband had personal knowledge of the decedent's recordkeeping practices in only one transaction, a loan to him. Petitioner did not offer any other proof to establish that the ex-husband could testify that the decedent routinely kept meticulous financial records. *Lasko v Cooper Laboratories, Inc,* 114 Mich App 253, 256; 318 NW2d 639 (1982); *Cook v Rontal,* 109 Mich App 220, 224; 311 NW2d 333 (1981).

Second, petitioner argues that the probate court erred in failing to allow her attorney to cross-examine respondent regarding respondent's handling of her grandmother's will and acquisition of real property owned by the grandmother. We disagree. Respondent's character for truthfulness was not at issue in this case, because petitioner had made no allegations that respondent had acted dishonestly toward the decedent. *Murphy v Muskegon Co,* 162 Mich App 609, 619; 413 NW2d 73 (1987). Petitioner's only claim was that the facts and circumstances surrounding the transfer of the bonds did not support respondent's claim that the decedent intended to make a gift at the time she gave respondent the bonds. The evidence sought to be elicited through cross-examination, thus, was not relevant to respondent's conduct toward the decedent and was more prejudicial than probative. *Scott v Hurd-Corrigan Moving & Storage, Co, Inc,* 103 Mich App 322, 342; 302 NW2d 867 (1981). Further, allowing the cross-examination would have opened the door to allow respondent's counsel to impermissibly introduce extrinsic evidence to counteract the prejudice created. *Scott, supra,* at 346. The evidence would not have impeached respondent's testimony, because respondent did not testify about her disposition of the decedent's estate. *Corcora v General Motors Corp,* 161 Mich App 92, 97; 409 NW2d 736 (1987).

Third, petitioner argues that the probate court erred by allowing respondent to testify that the estate's attorney asked her a question regarding the decedent's intent to replace a will bequest to respondent with the gift of the bonds. The question was not a hearsay statement because it was not offered to prove the truth of the matter asserted. *McCallum v Dep't of Corrections,* 197 Mich App

589, 603; 496 NW2d 361 (1992). Rather, the question was offered to respond to petitioner's counsel's question to respondent regarding why the attorney did not obtain an affidavit from respondent's fiancé, who had seen the decedent give the bonds to respondent but who died before trial began. We hold that the probate court did not abuse its discretion in making the three evidentiary rulings challenged by petitioner. *Cleary v The Turning Point,* 203 Mich App 208, 210; 512 NW2d 9 (1994).

Finally, petitioner argues that the probate court erred in awarding attorney fees to respondent under MCL 600.2591; MSA 27A.2591, because the court erroneously ruled that petitioner's claim had no legal merit. We disagree. Petitioner failed to offer any evidence either before trial or during trial to substantiate her claim that the decedent had not intended to make a gift of the bonds to respondent. Petitioner admitted in her deposition and in a pretrial affidavit that her only basis for believing that the decedent had not given the bonds to respondent was her belief that had the decedent given away the bonds, the decedent would have told petitioner, and the decedent had said nothing to petitioner. Further, petitioner waited until the decedent's estate had been open for twenty months and until after respondent's fiancé had died before filing her claim to the bonds. We conclude that the probate court correctly found that petitioner's claim was frivolous. *LaRose Market, Inc, v Sylvan Center, Inc,* 209 Mich App 201, 210; 530 NW2d 505 (1995); *Vermilya v Dunham,* 195 Mich App 79, 84; 489 NW2d 496 (1992). Therefore, the trial court did not abuse its discretion in awarding attorney fees to respondent. *Hovanesian v Nam,* 213 Mich App 231, 238; 539 NW2d 557 (1995).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen P. Reilly
/s/ William C. Buhl